INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Campodonico v. *United States*, 222 F. 2d 310, certiorari denied, 350 U.S. 831	6
Delli Paoli v. *United States*, 352 U.S. 232	5, 6
Fowler v. *Hunter*, 164 F. 2d 668, certiorari denied, 333 U.S. 868	6
Shepherd v. *United States*, 163 F. 2d 974	6

Statutes:

18 U.S.C. 479	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 786

JOHN A. KAYE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A) was entered on January 17, 1958. The petition for a writ of certiorari was filed on February 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court in a joint trial involving petitioner and two co-conspirators to admit statements made by one defendant and evidence of flight by another defendant after the conspiracy ceased even though the court instructed the jury to con-

sider such statements or acts only against the particular defendant involved.

2. Whether the case should have been dismissed for lack of a speedy trial where there was no motion by defendant, either for a prompt trial or for dismissal of the indictment.

STATEMENT

In the United States District Court for the Southern District of New York petitioner was found guilty (R. 3) on two counts for wilfully uttering with intent to defraud two counterfeit $1000 Kingdom of Belgium bonds (count 1) in violation of 18 U.S.C. 479 and of conspiring (count 2) to violate 18 U.S.C. 479 by negotiating 244 of the same counterfeit bonds (R. 8-9). Petitioner was sentenced to concurrent terms of two years on each count and fined $2500.00 on count one (R. 4). His conviction was affirmed on appeal.

The evidence showed that petitioner, a licensed securities broker, was a friend of Evangelista (Evans), an ex-prize fighter (R. 82a).[1] In October, 1949, Evans was asked by Mr. Berger if he wanted to buy some bonds. Evans told Berger that he knew a stock broker who might be interested. Evans then approached petitioner who indicated, presumably without asking who the owner was, that he was interested and asked about the kind and price of the bonds. Evans was told by Berger that the bonds were Belgium bonds and the price was 60 per cent of their face value *i.e.*, $600 for a $1000 bond. In October, 1949, Evans took two of the bonds to petitioner (R. 82a) telling him that there

[1] The numerals followed by "a" refer to the Government's appendix which was filed in the Court of Appeals and is part of the record in this Court. The other references are to petitioner's appendix in the Court of Appeals.

was a quarter of a million dollars in these bonds and that they were the possessions of some wealthy refugees who wanted to get back to Europe (R. 1a). From his cashier petitioner obtained a quotation of 116½ ($1165 for a $1000 bond). When petitioner told Wheeler, a friend of his employed at a bank, about the possibility of buying the bonds below the market, Wheeler warned petitioner to be careful about the sellers (see R. 45, 46).[2]

Earlier in the year petitioner had informed Arthur Baum, president of the First Guardian Securities Company, that he would like to arrange a loan for Better Products Company using foreign bonds as collateral (R. 29a). It was later agreed, however, that petitioner, instead of pledging foreign bonds as collateral to Baum, would sell 250 Belgain bonds of $1000 each at a price of $600 a bond plus $50 commission per bond for petitioner (R. 31a-32a). The low price, petitioner said, was due to a disagreement among the refugees who had some money in the Better Products Company and wanted to get out of the company and go home (R. 34a).

Petitioner delivered one bond to Baum and a few days later Baum came to petitioner's house and paid cash for two more bonds ($1200) and $7000 (by check to petitioner) as down payment on the remainder of the bonds (R. 32a, 35a, 42a, 44a). Evans delivered the remaining 240 bonds to petitioner who turned them over to Baum (R. 36a). Baum agreed to pay $50,000 in cash by the following Monday to complete the deal.

Later that evening, petitioner went to Baum's house and told him that Mr. Young, his principal and an

[2] Some of the evidence in the preceding paragraph is contained in the Government's appendix, which was filed in the Court of Appeals (R. 53a, 55a, 57a, 58a) and is set forth as background

officer of the Better Products Company (R. 32a), did not want the bonds out over the week-end (R. 38a). Baum falsely told petitioner that he had already sold the bonds to a customer. He gave petitioner two checks made to petitioner's order for $46,400 and $99,600 (R. 20a, 38a-39a). Petitioner took these checks outside to a car but about an hour or so later he and two other men, described by petitioner as Young's messengers, returned and insisted that Baum turn the bonds over to them (R. 40a-44a). Baum subsequently gave to these men 230 of the bonds (R. 42a).

Before completing the deal Baum checked the bond numbers and learned that many of the Belgian bonds had been redeemed and destroyed or cancelled (see R. 36). When Baum told petitioner this, the petitioner said the deal was off. He said that he had given part of Baum's $7000 deposit to Mr. Young and he instructed Berger to get the money. Berger left but never returned. Petitioner gave various statements as to the transaction to federal Secret Service agents in November, 1949; to the Attorney General of New York in January, 1950; to the National Association of Securities Dealers in March, 1950; and to the grand jury in June, 1952. There were a number of inconsistencies in these statements (R. 1a-22a).

ARGUMENT

1. Near the end of the government's case, the testimony of Evans before the grand jury in June, 1952, was offered in evidence against Evans alone. The statement was exculpatory in nature, but did mention dealings with petitioner and Berger (R. 53a-80a). In his charge, the judge said (R. 42):

> And again I repeat,[3] be careful now that when you consider what Kaye said after this was all over and before he took the stand, and when you consider what Evans said after it was all over and before the trial, that whatever they said counts against the one who said it, and not against anybody else.

There was also testimony by a police officer of the apprehension of Berger in a clothes closet in an Atlantic City, New Jersey, apartment (see R. 40) in November, 1951. As to this, the court charged (R. 63):

> I alluded to the evidence of flight by Berger and I want to be sure that, assuming you believe that evidence of flight * * * I want to be sure that you disregard this evidence of flight received against the defendant Berger, in considering the cases of the other defendants.
>
> In other words, if it is received and considered by you, it should be received and considered as against Berger, not as against anybody else.

In the face of these careful instructions, the argument that the admission of the testimony referred to constituted prejudicial error is clearly without merit. *Delli Paoli* v. *United States*, 352 U.S. 232. Whatever distinctions may be drawn between the statement in the *Delli Paoli* case (made immediately after the event which strongly implicated the defendant there), and the statement of Evans here (which was exculpatory in

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[3] The judge had previously given a similar charge with respect to Kaye's grand jury testimony and mentioned the general rule as to post-conspiracy statements (R. 31).

nature and did not directly implicate petitioner at all), make this an even stronger case than *Delli Paoli*. As the Court of Appeals pointed out, the admissible evidence against petitioner was sufficient to support the verdict.

2. Petitioner contends that, in violation of the Sixth Amendment, he was denied a speedy trial (Pet. 8) in that he was not brought to trial until 4½ years after he was indicted.[4] Petitioner never requested an earlier trial and he made no motion to dismiss on such ground at the trial. Under these circumstances, he cannot after trial attempt to have his conviction set aside on such ground, particularly since no showing is made that petitioner was prejudiced by the delay and since he apparently deemed it the better strategy on his part not to press for trial. The constitutional right to a speedy trial is a personal right which may be waived by failure to assert it. *Campodonico* v. *United States*, 222 F. 2d 310 (C.A. 9), certiorari denied, 350 U.S. 831; *Fowler* v. *Hunter*, 164 F. 2d 668 (C.A. 10), certiorari denied, 333 U.S. 868; *Shepherd* v. *United States*, 163 F. 2d 974 (C.A. 8).

[4] The delay in indictment after the offense was obviously due to the fact that Berger was not found until November, 1951.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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